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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE ARGUMEDO,

Defendant and Appellant.

B228555

(Los Angeles County  
Super. Ct. No. GA077278)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed as modified.

Marilyn Drath, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Jesse Argumedo (appellant) was convicted by a jury of assault with a deadly weapon (Pen. Code,<sup>1</sup> § 245, subd. (a)(1); count 1); misdemeanor assault (§ 240; count 2); assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); count 3), and battery with serious bodily injury (§ 243, subd. (d); count 5). The jury also found: (1) all four counts were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b); (2) in counts 1, 3, and 5, appellant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a); and (3) in count 5, he personally used a deadly weapon within the meaning of section 12022, subdivision (b)(1). He was sentenced to 12 years in prison. Appellant contends the trial court erred in refusing to bifurcate the gang allegation, there is insufficient evidence to support the gang enhancement, and his sentence was incorrectly calculated. We agree appellant's sentence must be modified. In all other respects, we affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Harry Bawaan and Alberto Alonso Jr. were exiting a nightclub in Alhambra at approximately 2:00 a.m. on June 27, 2009. They had each consumed two to four alcoholic drinks during the previous two hours. They passed a parked Honda Accord with three or four people inside. One of them, a male, got out of the car and asked Alonso where he was “from,” which Alonso understood as a question about his gang affiliation. Alonso was not affiliated with a gang, so he did not answer. Others got out of the Honda and one of them hit Alonso in the face. Alonso lost consciousness. Bawaan ran back towards the nightclub and saw three or four people hitting Alonso. Bawaan saw a male coming towards him, and recognized the person as someone who had been called “Casper” in the nightclub earlier that evening. Appellant threw a bottle and hit Bawaan in the head. Bawaan also lost consciousness. When he awoke, he saw Alonso lying face

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<sup>1</sup> All further statutory references are to the Penal Code.

down in front of the Honda. As Bawaan pulled Alonso out of the car's path, the car drove away.

At a photographic line-up, Alonso identified appellant as one of his attackers and Bawaan identified appellant as the man who threw the bottle at him. At trial, Bawaan identified appellant as the man who threw the bottle at him and Alonso identified appellant as the person who first approached him. Casper's picture was not included in the photographic lineup and was not otherwise identified.

Appellant's girlfriend, Courtney Completo, was also at the nightclub that night with her girlfriends. Appellant had gone to the nightclub with his friends Kevin Torres, Casper, and Gabriel Celaya in Torres's car, a Honda Civic. Casper was kicked out by security guards earlier in the evening. At approximately 2:00 a.m., appellant and Completo were sitting in a car in the parking lot of the nightclub. Her girlfriends exited the nightclub and walked towards the car. Torres, Casper, and Celaya were already in Torres's car. Celaya got out and helped one of the girls into Completo's car. Completo said that Casper bumped into someone and Celaya asked the person where he was from. A fight ensued between Celaya, Casper, and two males. Appellant was next to her in the car, but then got out and joined in the fight. She said Casper was about 6 feet tall, 180 to 190 pounds, and bald.

Constantino Bandy testified that he was exiting the nightclub and saw two men walking in front of a Honda. Three men came out from the Honda and the driver stayed inside. Two men were kicking and punching one man and one man ran back towards the nightclub with one man chasing him. The man who was chasing the other male was approximately 5 feet 11 inches tall, heavyset, with a shaved head, and had a bottle in his hand. The man threw the bottle and it hit the other man in the head. The heavyset man began punching the other male, who was trying to defend himself. Then the three men who came out of the Honda got back in. Bandy wrote down part of the car's license plate number. At a photographic lineup and in court, he was unable to identify any of the assailants.

Alhambra Police Officer Dany Fuentes responded to a call from the nightclub earlier in the evening and saw another Alhambra officer appearing to direct a group away from the nightclub. Appellant was a member of that group. Fuentes returned approximately 20 minutes later in response to a second call. He noted that Alonso and Bawaan had sustained injuries. Fuentes spoke to Constantino Bandy, who gave him the partial license plate number and a description of the car in which the attackers left.

Several days later, Officer Fuentes reported to the police station after appellant and Torres were apprehended in a vehicle matching Bandy's description and questioned them about the incident.<sup>2</sup> Appellant said he was not at the nightclub.

Los Angeles Police Officer Kelly Edwards had previously been a member of the gang enforcement detail for three and a half years. He dealt specifically with the Avenues gang. On May 20, 2009, Edwards responded to a radio request for a gang unit on Figueroa Street in Los Angeles, which was inside Avenues territory. He saw appellant at the location with Gus Celaya, whom Edwards knew to be a member of the Avenues gang. Gus's brother, Gabriel Celaya, was an admitted member of the Avenues gang. Edwards asked appellant if he was from the Avenues gang. Appellant said he was, and that his moniker was "Mugsy." Edwards took photographs of appellant's tattoos, which included two skulls on his left forearm and an "A" tattooed on one of his fingers. One of the skulls had a baseball cap with the letters "L.A." Officer Edwards said that "L.A." stood for "Los Avenidas," Spanish for "The Avenues."

Los Angeles Police Officer Curtis Davis also testified at trial as a gang expert. It was his opinion that appellant was a member of the Avenues gang based primarily on appellant's tattoos. The gang's primary activities include anything from battery to murders. Alhambra, where the assault took place, is not in the Avenues territory. Davis opined that the Avenues gang was trying to expand its operations and that activity in the parking lot of the nightclub benefitted the gang. He testified that asking, "Where are you from?" is a challenge to either a rival gang member or an ordinary citizen. The gang

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<sup>2</sup> Torres said he was at the nightclub on the night of the fight. He said he saw the altercation and left the location.

culture requires the gang to back up an individual who issues a gang challenge. An act of violence would cement its reputation in the local community, creating a culture of fear. Officer Davis stated that members of the Avenues use several symbols to represent their gang, including “A,” “L.A.,” and a skull wearing a fedora. Sports logos which use the letter “A” or images of a skull were also used to represent the gang. Appellant’s Myspace page displayed several images relating to the Avenues gang, including images of the Los Angeles Dodgers, a skull with a hat, and an Oakland Athletics baseball cap.

The defense called its own gang expert, Humberto Guizar. Guizar testified that he was currently a civil rights attorney. He had once belonged to a gang which was a rival of the Avenues gang and now works with gang members. The Avenues had expanded its territory within Los Angeles, but it did not extend into Alhambra. Alhambra was either considered “neutral” territory or it belonged to another gang. He did not believe that a fight outside of a bar would be connected to gang activity if the other party was not a gang member. Guizar did not believe that the question, “Where are you from?” necessarily denotes a gang challenge. He thought it was unlikely that appellant, a 25-year-old with two children, would be an active member of a gang. He did not think that appellant’s tattoos necessarily meant he was a gang member. He might have tattoos because he had family ties to the gang.

Appellant also presented as character witnesses two coworkers who knew him well. They testified that appellant was not a gang member or a violent person. One said that appellant was a member of his trade union and that it was common for union members to use skulls as their logo.

## **DISCUSSION**

### **I. Motion to Bifurcate**

Appellant contends the court erred in denying his motion to bifurcate the gang enhancement from the underlying charges. He argues because there was little evidence identifying him, the gang evidence was prejudicial and irrelevant.

The trial court has the discretion to bifurcate trial of a gang enhancement from the substantive offenses. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048.) “[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]” (*Id.* at p. 1049.) In moving for bifurcation, the defense must “‘clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.’ [Citation.]” (*Id.* at p. 1051.)

Bifurcation may be necessary where the predicate offenses offered to establish a pattern of criminal activity are unduly prejudicial or where some of the other gang evidence may be so extraordinarily prejudicial and of so little relevance that it may influence the jury to convict regardless of the defendant’s guilt. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.)

Appellant has failed to establish that the trial court abused its discretion in denying his bifurcation motion. The court recognized that the gang evidence was relevant to prove motive and intent for the charged crimes, as well as appellant’s identity. Appellant was with other gang members at the fight and when apprehended. He had visible tattoos identifying himself as a member of the gang. The gang challenge and expert witness opinion explained the intent and motive for the attack in non-gang territory. Any evidence admitted to prove the gang enhancement was not irrelevant to the charged offenses, or so inflammatory in comparison that it threatened to sway the jury to convict appellant regardless of whether the evidence established his guilt. Appellant did not meet his burden of clearly establishing that the gang evidence created “‘a substantial danger of prejudice requiring that the charges be separately charged.’ [Citation.]” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1051.)

Further, the jury was instructed about the limited purpose of the gang evidence. The court informed the jury, “You may consider evidence of gang activity only for the

limited purpose of deciding whether: the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related enhancement. You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his . . . opinion. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.” (Italics added.) This instruction, which the jury is presumed to have followed, nullified any potential for prejudice. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

## **II. Sufficiency of the Evidence**

Appellant contends there is insufficient evidence to support the gang enhancement. He argues that he did not fit the definition of an active gang member, the crime did not occur in gang territory, and there was no indicia of gang activity, such as the flashing of gang signs or calling out of gang names. He argues the evidence showed nothing more than a fight among patrons drinking at a nightclub.

In resolving claims of insufficient evidence, we view the evidence in the light most favorable to the judgment and determine whether there is credible evidence from which the trier of fact can find the defendant guilty. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.)

The evidence established that on the night of the incident, appellant was with other gang members and uttered a gang challenge to one of the victims. He admitted that he belonged to the Avenues gang two months before this incident and had several gang tattoos on visible areas of his body. Although the crime was not committed in the Avenues gang territory, the prosecution’s expert opined that the gang was trying to expand their territory. The jury was not required to find that this was a random act of violence having no connection to gang activity. The expert opinion and the circumstances of the crime were sufficient to support the gang enhancement. (*People v.*

*Galvez* (2011) 195 Cal.App.4th 1253, 1261-1262; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.)

### **III. Sentencing**

Appellant was sentenced to two years for count 1 plus a consecutive 10-year enhancement for the gang allegations. He was sentenced to a concurrent term of two years, six months for count 2. The court struck the great bodily injury enhancement and stayed the sentences for counts three and five.

Appellant contends that the sentence for count 2 was incorrectly calculated by the trial court. In count 2, appellant was found guilty of the lesser included offense of simple assault (§ 240) and the enhancement pursuant to section 186.22, subdivision (d) was found true. The court sentenced appellant to six months for the assault plus two years pursuant to section 186.22, subdivision (d). Appellant contends, and the People concede, that he could be sentenced only to the term provided in section 186.22, subdivision (d) as an alternative to the sentence for the assault, not in addition to the prescribed six-month term for the crime. We agree. *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 898-899, explained that subdivision (d) is an alternate penalty provision, not a sentencing enhancement. Therefore appellant's sentence for count 2 should be two years. Because the term in count 2 was ordered to be served concurrently with the sentence in count 1, appellant's total prison sentence is unchanged.

### **DISPOSITION**

The judgment of conviction is affirmed. The sentence is modified to provide for a term of two years on count 2 to run concurrent with the sentence in count 1. The clerk of



the superior court is ordered to forward a copy of the corrected abstract to the Department of Corrections and Rehabilitation.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.